

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)

Advanced Television Systems and)
Their Impact Upon the Existing)
Television Broadcast Service)

RM-9260

To: The Commission

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JUN - 8 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF KM COMMUNICATIONS, INC.

KM Communications, Inc. ("KM"), pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b), respectfully submits these Reply Comments in response to comments filed by various parties in response to the petition for rulemaking filed by the Community Broadcasters Association ("CBA") in the above-captioned proceeding.¹ The Petition proposes the creation of a new primary class (i.e., a "Class A") of television stations for certain qualified Low Power Television ("LPTV") stations that provide substantial local or specialized programming to their communities. As stated in its comments filed May 22, 1998, KM supports the Petition and urges the Commission to promptly adopt a Notice of Proposed Rulemaking (an "NPRM") in this proceeding. In support of the Petition and these Reply Comments, the following is shown:

¹ See Advanced Television Systems and Their Impact Upon the Existing Television Service, Petition for Rulemaking, RM-9260, filed September 30, 1997 and amended March 18, 1998, by CBA (the "Petition"). Statements in support of or opposition to the Petition were required to be filed on or before May 22, 1998, and reply comments are due on or before June 8, 1998. See Public Notice, Petition for Rulemaking Filed For "Class A" TV Service, RM-9260, Mimeo No. 82996 (Mass Media Bureau, released April 21, 1998)(the "Class A Public Notice").

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1. KM, a minority- and female-owned Illinois corporation, is the licensee of four LPTV stations, all in major television markets,² and is also building upon its LPTV broadcasting experiences to expand into full power broadcasting.³ KM currently provides programming on its LPTV stations targeted toward local ethnic and minority communities in its markets, including foreign language programming, as well as other alternative programming. Accordingly, as a licensee of the type of LPTV stations that would qualify for the proposed new primary Class A status, KM is interested in this proceeding, and KM supports the Petition and the CBA's efforts.

2. As set forth more fully in its comments, KM has invested considerable time and resources in upgrading its LPTV stations, to improve their coverage and specifically to reach certain ethnic and minority communities, so that KM could provide local and specialized programming, including foreign language programming, targeted to the interests of those local communities.⁴ Having made such a substantial investment in its LPTV stations, KM has been greatly concerned with just how "secondary" the Commission has viewed the secondary status of LPTV stations during the digital television ("DTV") proceeding,⁵ and the prospects for its

² KM is the licensee of WOCH-LP and WOCK-LP, Chicago, Illinois; WMKE-LP, Milwaukee, Wisconsin; and WSKC-LP, Atlanta, Georgia.

³ KM is the permittee or its principal has interests in the permittee (or anticipates holding interests in such permittees under settlements pending before the Commission) for several new full power television and FM radio stations, and has several more applications pending for additional new full power commercial television and commercial radio stations.

⁴ See KM Comments at 2.

⁵ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268.

LPTV stations to survive the DTV transition.⁶

3. About 50 parties filed comments in support of the CBA's Petition, urging the Commission to adopt a formal NPRM and go forward with the proceeding, as compared to about 4 parties that opposed adoption of an NPRM. A common theme among the parties supporting the Petition is that, like KM, they are small businesses, often owned by women and/or minorities seeking a voice in the broadcast industry, who have made quite substantial investments in LPTV stations in order to be able to serve their local communities by providing local and/or foreign language programming, and now are faced with the potential displacement of some or all of their LPTV stations during the DTV transition. These parties all supported the CBA Petition in general, while often offering suggestions or details for improving the draft rules proposed by the CBA for the new Class A status television stations.⁷

4. Not surprisingly, the few parties opposing the Petition were full power television broadcasters or their representative organizations, whose arguments essentially echo two main themes: (i) that LPTV stations have always been secondary, so there is no reason to ever change that secondary status, despite the changes that have occurred in the LPTV industry over time;

⁶ See KM Comments at 3. Specifically, when KM acquired and began to upgrade its LPTV stations in 1994, KM recognized and could evaluate the risk that as a secondary service it could be displaced by a full power television station. However, KM could not have reasonably anticipated the Commission's decisions which placed the entire industry at risk of displacement so that a block of channels could be reallocated for other services and/or auctioned off to generate revenues for the federal government.

⁷ KM will focus its Reply Comments on addressing the arguments raised by parties opposing the adoption of an NPRM in this proceeding, rather than the details of the Class A rules which should be adopted. KM believes that the purpose of the pleadings at this petition for rulemaking stage is to determine whether an NPRM should be adopted, and to assist the Commission in defining the scope of the issues to be addressed in an NPRM. Once an NPRM is adopted, KM will submit comments addressing the details of the rules that may be proposed.

and (ii) that it is too early in the DTV transition period to do anything that may upset the DTV transition, since further changes may be required for DTV implementation, and therefore it is premature to go forward with a rulemaking proceeding at this time. KM asserts that the first argument is myopic, and that the second concern is not well founded.

5. Some of the opposing commenters suggest that since LPTV stations have had secondary status since the rules for LPTV were first adopted, and the Commission relied on and found this secondary status useful in adopting DTV rules, that LPTV stations should remain secondary forever, even after the DTV transition.⁸ By the logic of these commenters, no rule changes should ever be adopted by the Commission, regardless of changes in the underlying industries regulated by the Commission, the merits of a proposal, or whether the rule change would serve the public interest. Extending this logic to other circumstances would suggest that the Commission should not have adopted DTV rules (since the Commission's prior rules did not permit DTV), or that the Commission should not have reallocated Channels 63-64 and 68-69 from broadcast to public safety uses (since the spectrum was originally allocated primarily for broadcast uses) -- yet few would argue that the implementation of DTV is not in the public interest, or that the DTV rule changes should not have been adopted. The Commission must consider the merits of the CBA Petition based on the public interest factors presented to it now, and not based on decisions in past years and under different circumstances that LPTV would be secondary.

⁸ See Opposition of the Association for Maximum Service Television, Inc. ("MSTV") at 8-10; and Comments of the National Association of Broadcasters ("NAB") at 1-4.

6. The remaining basic opposing arguments center around the DTV transition, the timing of that transition versus the implementation of Class A status rules for LPTV, and what interference protections certain categories of stations should receive. For example, MSTV suggests that Class A status for LPTVs would disrupt the process of full power stations applying for and receiving construction permits for DTV facilities,⁹ when the DTV construction permit process will likely be completed well before the Commission could finalize rules for Class A status. All commercial full power television station licensees must file their applications for DTV construction permits no later than November 1, 1999, and all noncommercial full power television stations must file for their DTV construction permits no later than May 1, 2000 (i.e., less than 2 years from now).¹⁰ Although KM would be delighted to see Class A rules adopted for LPTV quickly, KM also recognizes that the Commission must still go through the administrative process -- of considering the comments filed in response to the CBA Petition and the Class A Public Notice, draft and vote to adopt an NPRM on proposed rules for Class A status, solicit and review comments and reply comments filed in response to the NPRM, draft an order adopting Class A rules (and inevitably consider and act on petitions for reconsideration of any rules adopted), and the new Class rules must become effective -- all before any LPTV stations may apply for Class A status. In KM's experience, the administrative process unfortunately will likely take more than the two years within which full power television stations must apply for their DTV construction permits, and the Commission may certainly control the effective date of any rules adopted to the extent necessary to protect the DTV transition process.

⁹ See MSTV Opposition at 4-8.

¹⁰ See 47 C.F.R. § 73.624(e); see also 47 C.F.R. § 73.624(d)(1)(iii)-(iv).

Therefore, KM submits that it is appropriate for the Commission to start this lengthy process now, by adopting an NPRM promptly, since there truly will be no opportunity for an application filing "race"¹¹ to develop.

7. MSTV and other commenting parties also express concern about the extent of the primary user status and interference protection that Class A television stations would receive and be required to give to full power stations,¹² which appears to revolve around the CBA's suggestion that Class A television stations should have "primary spectrum user status against all but full power television stations authorized as of the date of [the CBA Petition]."¹³ KM believes that this is simply a definitional issue, and of crafting language that more clearly states which stations are entitled to interference protection, a process that certainly could and should be addressed in the context of an NPRM and the formal comments filed in response thereto. In its Comments, KM attempted to present a more precise and workable definition, which appears to alleviate the opposing parties concerns: "a new Class A television station should be accorded primary status with protection against interference from any other stations except for (i) existing full power analog and DTV stations operating, or future full power analog and DTV stations that become authorized to operate, on a channel specified in the allotment tables¹⁴ as of the date that the Class A application is filed; and (ii) LPTV or TV translators, to the extent of the protected contours authorized for such stations as of the date the Class A application is

¹¹ See MSTV Opposition at 7-8; NAB Comments at 5.

¹² See MSTV Opposition at 4-5; and NAB Comments at 4-5.

¹³ See CBA Petition at 1 (emphasis added).

¹⁴ See 47 C.F.R. §§ 73.606(b) (analog TV Table of Allotments) and 73.622(b) (DTV Table of Allotments).

filed."¹⁵

8. Under KM's proposed terms, the Class A licensee would not gain a "priority over all DTV stations that have not filed and received approval for a construction permit as of the date of filing the Class A application"¹⁶ because the DTV stations would be protected based upon the DTV allotment table, even in the unlikely event that the LPTV station is able to file its Class A application before the DTV licensee can file its construction permit application. The same logic would apply for parties with applications pending for full power analog television stations that ultimately get granted,¹⁷ since they would become authorized to operate on channel allotments specified in the TV allotment table when the Class A application is filed, and would be protected based on that allotment.

9. The new Class A television rules, as envisioned by KM, also would not have the adverse effects on public television stations suggested by the Association of America's Public Television Stations ("AAPTS"),¹⁸ since noncommercial stations would also be protected based upon their analog or DTV allotments as of the date a Class A application may be filed. The Class A rules would also not adversely affect the ability of public television translators that are displaced to find new channels,¹⁹ since displaced translators would not be able to use a channel already used by an existing LPTV station (whether Class A or not), and Class A LPTVs would

¹⁵ See KM Comments at 5-6.

¹⁶ See MSTV Opposition at 5; see also NAB Comments at 5.

¹⁷ See MSTV Opposition at n.16.

¹⁸ See AAPTS Comments at 4-8.

¹⁹ See AAPTS Comments at 7-8.

have to protect (and would not have any priority over) translators existing as of the date the Class A application is filed, under KM's proposals. Furthermore, as explained above, most if not all of the displacements are likely to occur before any Class A television rules are adopted. KM agrees with AAPTS's concerns that language must be added to protect full power television stations whose analog and DTV allotments both are outside the core channels (i.e., Channels 2 to 51),²⁰ but again this is simply a matter of adding appropriate language during the NPRM process, not a reason to dismiss the Petition or not adopt an NPRM in the first instance. KM also does not object to AAPTS's request to permit public television translators providing service to unserved areas to apply for primary Class A status.²¹

10. In summary, KM does not expect Class A status to provide a mechanism to protect its LPTV stations or to gain some special priority over the full power television station industry, or even to prevent the displacements that may come about during the DTV transition, and KM is prepared to accept the "burdens of all the regulations of full-power stations" as proposed by the CBA.²² KM's desire is for a primary Class A status for certain qualifying LPTV stations that survive the DTV transition and do not interfere with full power television allotments, so that the large numbers of LPTV stations, and the valuable local services they provide, are not displaced and lost the next time the federal government decides to balance the budget by reallocating and auctioning off television broadcast station spectrum.

²⁰ See AAPTS Comments at 5-6.

²¹ See AAPTS Comments at n.17.

²² See CBA Petition at 2; but see NAB Comments at 3.

Wherefore, the above Reply Comments being considered, KM respectfully requests that the Commission adopt a Notice for Proposed Rulemaking proposing rules for a new primary Class A status for certain qualified LPTV stations providing substantial local or specialized programming, consistent with the comments of KM expressed herein.

Respectfully submitted,

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June 8, 1998

CERTIFICATE OF SERVICE

I, Myoung Hwa Bae, hereby certify that on or before this 8th day of June, 1998, copies of the foregoing "Reply Comments of KM Communications, Inc." have been served by first-class United States mail, postage prepaid, upon the following:

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